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June 24, 2004

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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Marlene Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
12th Street Lobby, Room TW-A325
Washington, D.C. 20554

Re: *United States Telecom Association, et al. v. FCC, et al.*

Dear Ms. Dortch:

Enclosed please find for filing on behalf of USTA copies of a letter delivered to John Rogovin and the attached White Paper regarding interim rules in the above-referenced matter.

Please date-stamp and return the enclosed extra copy. Thank you for your assistance.

If you have any questions, please call me at 202-326-7902.

Sincerely,

Michael K. Kellogg

Enclosure

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June 24, 2004

John A. Rogovin, General Counsel
Office of the General Counsel
Federal Communications Commission
445 12th Street, S.W.
Room 8-C750
Washington, D.C. 20554

Re: *United States Telecom Association, et al. v. FCC, et al.*

Dear John:

Press reports indicate that the Commission is considering adopting interim rules in the wake of the D.C. Circuit's vacatur of portions of the Triennial Review Order. I have been greatly surprised to read in some accounts that those rules may closely resemble the unlawful rules vacated by the D.C. Circuit and that they may be of indefinite duration pending a full rulemaking on remand.

The Commission certainly has some flexibility in passing interim rules in the wake of a vacatur of existing rules. But there are also serious constraints on the Commission. On behalf of USTA, I outline those constraints in the attached white paper.

Yours sincerely,

Michael Kellogg

Attachment

cc: The Hon. Michael K. Powell
The Hon. Kathleen Q. Abernathy
The Hon. Michael J. Copps
The Hon. Kevin J. Martin
The Hon. Jonathan S. Adelstein

LAWFUL INTERIM UNBUNDLING RULES MUST BE CALCULATED TO ADDRESS THE DEFICIENCIES IDENTIFIED BY THE FEDERAL COURTS

In the wake of the D.C. Circuit's vacatur of this Commission's most recent attempt to craft lawful unbundling rules, the major ILECs have made voluntary commitments to offer to continue providing certain UNEs to ensure stability and allow for a prompt transition to lawful rules. Some parties, however, have suggested that the Commission should adopt interim rules that go beyond what a particular company has committed to voluntarily, purportedly to preserve the status quo pending a full rulemaking on remand.

Any interim rules that seek to reimpose the Commission's now-vacated unbundling regime would be flatly unlawful. To the extent that the Commission chooses to adopt interim rules, it must ensure that those rules adhere to established legal requirements. If the Commission fails to do so, the Commission's rules will be invalidated yet again, which would undermine the Commission's attempts to transition to a lawful UNE regime that encourages facilities-based competition.

First, the Commission may not create interim rules that simply reinstate the same unbundling requirements that have now been vacated three times by the federal courts. Any such action would be a grossly unlawful attempt by the Commission to grant itself the same stay that both the D.C. Circuit and the Supreme Court denied. There should be no doubt that the D.C. Circuit, which has already expressed frustration at the Commission's "failure, after eight years, to develop lawful unbundling rules" and its "apparent unwillingness to adhere to prior judicial rulings," *USTA v. FCC*, 359 F.3d 554, 595 (D.C. Cir. 2004) ("*USTA II*"), would take prompt action to invalidate such a Commission decision.

Indeed, precedent strongly supports the issuance of a writ of mandamus in such a circumstance. In *International Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920 (D.C. Cir. 1984) (per curiam), the D.C. Circuit had both vacated the Department of Labor's rescission of a certain rule and, as here, denied the agency's motion for a stay of the mandate. *See id.* at 921. Nevertheless, when the Department of Labor issued its NPRM seeking comment on a new rule, it simultaneously purported to adopt an "emergency" rule reinstating the rescission of the relevant rule for 120 days. *See id.* The court of appeals made plain that the agency's actions were flagrantly unlawful and justified mandamus. In response to a motion to enforce the mandate, the D.C. Circuit explained that the agency had, "in effect, implemented the stay on [its] own" and "reimplemented precisely the same rule that this court vacated as 'arbitrary and capricious.'" *Id.* at 923. Although the D.C. Circuit decided that, given the procedural posture of the case, the district court should decide the mandamus issue in the first instance, the court made plain that, on the current record, it was "clearly correct" that the agency had violated the D.C. Circuit mandate and that, unless new information became available, the district court "must act forthwith to enforce the mandate and require the Secretary to comply with its terms." *Id.*

More recently, in *Radio-Television News Directors Association v. FCC*, 229 F.3d 269 (D.C. Cir. 2000), the D.C. Circuit granted mandamus against this Commission for reinstituting the same rules that the court of appeals had vacated. There, as here, the Commission had failed

over a prolonged period to demonstrate that the relevant rules were lawful, and, again as in this case, the court had required the agency to act expeditiously on remand. *Id.* at 270. Instead of doing so, however, the Commission adopted an interim measure that would put back in place the same rules that the petitioners had long attacked. *See id.* at 271 ("notwithstanding the Commission's continuing failure to provide adequate justification . . . petitioners would again be subject to the [same] rules"). The D.C. Circuit explained that, given the Commission's recalcitrance and its inability over many years to justify the same rules, the court's "decision is preordained and the mandamus will issue." *Id.* at 272; *see also American Trucking Ass'ns, Inc. v. ICC*, 669 F.2d 957 (5th Cir. 1982) (per curiam) (granting mandamus where court of appeals had remanded rules back to the ICC, which, without promulgating any new rules, proceeded with adjudications that did not apply the principles articulated in the prior opinion).

Under these cases, any Commission attempt to adopt interim rules that simply reinstated maximum unbundling would face a quick and embarrassing defeat in the D.C. Circuit.

Second, any interim rules the Commission does adopt must be "reasonably calculated" to address the deficiencies identified in the D.C. Circuit's most recent decision (as well as in the prior D.C. Circuit and Supreme Court judgments that the D.C. Circuit was effectuating). *Mid-Tex Elec. Coop., Inc. v. FERC*, 822 F.2d 1123, 1130 (D.C. Cir. 1987); *see Brae Corp. v. United States*, 740 F.2d 1023, 1070-71 (D.C. Cir. 1984) (per curiam) (interim rules "must avoid the problems we have identified in this opinion"). That task requires that any interim rules adhere to the "'letter [and] spirit of the mandate.'" *Coal Employment Project v. Dole*, 900 F.2d 367, 368 (D.C. Cir. 1990) (per curiam) (quoting *Mid-Tex*, 822 F.2d at 1130).

These established standards require that, at the very least, any interim unbundling rules take account of market facts demonstrating that CLECs can and do compete in many classes of markets today without unbundling. As the D.C. Circuit has explained, "the purpose of the [1996] Act is not to provide the widest possible unbundling, or to guarantee competitors access to ILEC networks at the lowest price that government may lawfully mandate. Rather, its purpose is to stimulate competition — preferably genuine, facilities-based competition." *USTA II*, 359 F.3d at 576. Accordingly, when CLECs are able to compete without UNEs — that is, when they are not impaired — the Commission may not require unbundling. *See id.* at 576-77.

Consistent with the D.C. Circuit's emphasis on that core statutory purpose, the Commission cannot simply disregard the indisputable fact that competitors (including fast-growing cable telephony providers) can and currently do compete without mass-market switching in many classes of markets around the country. Similarly, the Commission must take account of the fact that CLECs are competing successfully using tariffed special-access products in many markets.[1] Thus, although the Commission may have room, in the context of interim rules, to engage in some degree of approximation in identifying these contestable markets, it may

[1] Time Warner Telecom, one of the top 10 CLECs in revenue, *see CLEC Report 2004*, Ch. 4 at Table 23 (18th ed. 2004), has recently stressed that it does not rely on UNEs to compete: "In instances where we need services from ILECs to connect our remote customers to our vast fiber network, we purchase those under special access tariffs or under agreements with the ILECs." Press Release, *Time Warner Telecom Not Impacted By UNE Ruling* (June 10, 2004).

not simply ignore the concerns that the D.C. Circuit identified, nor may it disregard the detailed evidence demonstrating that CLECs can and do compete in many markets using alternative facilities. In short, the Commission cannot use interim rules "to avoid . . . the analysis that [the D.C. Circuit] required in [its prior opinion]." *American Gas Ass'n v. FERC*, 888 F.2d 136, 148 (D.C. Cir. 1989) (vacating interim rule that did not adequately respond to prior D.C. Circuit judgment).

In this regard, where the Commission finds no impairment in its interim rules — or, for that matter, in its final rules — it must adopt a rapid transition away from the unbundling that has previously been unlawfully required. Where the Commission is unable to make a supportable determination of impairment (as will necessarily be the case in many markets), it will have no lawful basis for requiring that ILECs continue to add *new* UNE lines. If CLECs are not impaired in a particular market, allowing them to add new lines is not a "transitional" step toward the result mandated by the 1996 Act. On the contrary, it is a step *away* from a lawful regime, and any rules authorizing such a result would unlawfully magnify the harm caused by the Commission's prior, now-vacated rules.

Indeed, the Commission has no authority to authorize new unbundling in such a circumstance. Congress made impairment the "touchstone" of the unbundling inquiry, *USTA v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (2003), and the Commission accordingly may not order unbundling without impairment. *See AT&T Corp. v. Iowa Utils. Bd*, 525 U.S. 366, 388-89, 391-92, 397 (1999) (finding that the Commission "was wrong" in concluding that impairment inquiry was discretionary); *Supplemental Order Clarification*,[2] 15 FCC Rcd at 9596, ¶ 16 (Commission determines "impairment" "before imposing additional unbundling obligations on incumbent LECs"). Any attempt to expand unbundling in the absence of a finding of impairment is thus beyond the Commission's statutory authority, regardless of whether it is labeled as "transition[al]." *See Environmental Defense Fund v. EPA*, 167 F.3d 641, 649 (D.C. Cir. 1999) (rejecting "grandfather" rule that would have exempted projects from conformity with statutory requirements); *Natural Resources Defense Council, Inc. v. Reilly*, 976 F.2d 36, 40-41 (D.C. Cir. 1992) (rejecting argument that stay of regulations was "a reasonable transitional regime" when statute "mandated" a different result) (internal quotation marks omitted).

The Commission must similarly require a prompt transition away from the use of UNEs to serve the existing base of CLEC customers in markets where the Commission makes no finding of impairment. For those customers, ILECs have already been required to provide UNEs for as many as eight years, without any lawful impairment finding. By the same token, CLECs have known throughout that period that their right to use these UNEs was subject to substantial legal challenge — indeed, challenges that have been successful and resulted in vacatur of these UNE rules on three separate occasions — so that those parties could not have reasonably relied on the indefinite availability of those UNEs. *See Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1110 (D.C. Cir. 2001) ("the agency orders on which [petitioners] claim to have relied not only had

[2] Supplemental Order Clarification, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587 (2000) ("*Supplemental Order Clarification*"), *aff'd*, *Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8 (D.C. Cir. 2001).

never been judicially confirmed, but were under unceasing challenge"). CLECs that have leased UNEs in such circumstances were making a calculated gamble, and they have no legitimate equitable claim. Thus, while a very short period of transition may be justified by the need to give CLECs time to make alternative arrangements (such as negotiating for alternatives to UNEs on commercial terms), any longer period would simply be an illegal attempt to perpetuate unlawful unbundling. Such action would be particularly illegitimate in this context, where the ILECs have already been forced to wait for nearly a decade for relief from the Commission's never-lawful unbundling rules. *Cf. Radio-Television News Directors Ass'n*, 229 F.3d at 271-72 (granting extraordinary relief where the Commission, after prolonged litigation, took action that still failed to "afford[] . . . relief" to petitioners).

Third, any interim rules adopted without full notice and comment must be in effect for only the short period until final rules may be issued. The Commission's authority to dispense with notice-and-comment procedures must be justified under the APA's "good cause" exception, which is "narrowly construed." *AFGE v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (internal quotation marks omitted). In some instances, the need to respond expeditiously to a court's mandate may create such good cause. *See, e.g., Mid-Tex*, 822 F.2d at 1133-34; *AFGE*, 655 F.2d at 1156-57. In this instance, however, it would be, to say the least, difficult to justify dispensing with notice and comment, given that the Commission has already waited nearly four months without acting to put such rules in place and thus has had ample time to seek comment before adopting any rules. *See generally AFGE*, 655 F.2d at 1158 (collecting cases in which courts struck down interim regulations where agency had ample time to conduct notice and comment between date of event requiring new rules and date of issuance of interim rules).

In any event, interim rules can be justified only as a means to an end — *i.e.*, as a way to bridge the gap until the agency can promulgate permanent rules pursuant to notice and comment. *See, e.g., Brae*, 740 F.2d at 1070-71 (agency could promulgate "temporary emergency rules . . . until . . . [agency] can, under the notice and comment procedure of the [APA], promulgate new permanent rules which reflect our holding"). Thus, if the Commission were to adopt interim rules, it would need to move quickly to issue final rules in order to demonstrate that "it is not engaging in dilatory tactics." *Mid-Tex*, 822 F.2d at 1132. Indeed, given that Congress allowed the Commission only six months to issue all the rules necessary to implement section 251, *see* 47 U.S.C. § 251(d)(1), under no circumstances would it be lawful for the Commission to take *more* than six months to issue new rules involving this subset of section 251 issues.